for 34, 47, 48 & 49

OCT. 10 1900

Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Reply Brief of Defendants in Error

Filed Oct. 10, 1900.

No. 34.

FRED HEWITT,

Plaintiff in Error,

vs.

EMIL SCHULTZ, ET AL.

No. 47.

WILLIAM L. POWERS, ET AL.,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

No. 48.

J. M. MOORE,

Plaintiff in Error,

vs.

D. B. STONE, ET AL.

No. 49.

J. M. MOORE,

Plaintiff in Error,

vs.

JOHN CARMODE.

REPLY BRIEF FOR DEFENDANTS IN ERROR IN No. 34 AND PLAINTIFFS IN ERROR IN Nos. 47, 48, AND 49.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 34.

FRED HEWITT,

Plaintiff in Error,

v.

EMIL SCHULTZ, ET AL.

No. 47.

WILLIAM L. POWERS, ET AL.,

Plaintiffs in Error,

v.

JACOB SLAGHT.

No. 48.

J. M. MOORE,

Plaintiff in Error,

v.

D. B. STONE, ET AL.

No. 49.

J. M. MOORE,

Plaintiff in Error,

v.

JOHN CARMODE.

Reply Brief for Defendants in Error in No. 34 and Plaintiffs in Error in Nos. 47, 48, and 49.

I.

It is argued in the brief for defendant in error in No. 47, and urged upon the oral argument in the other cases, that the relief sought against the patents, issued under the ruling of the Secretary of the Interior, is barred by the statute of limitations. This argument is based upon a misapprehension of the ground upon which the relief is claimed. The law was settled by the decision of this Court in *Wisconsin Central R. Co.* v. *Price County* (133 U. S. 496), that the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior. But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This Court enforced such a right in *St. Paul and Sioux City R. Co.* v. *Winona and St. Peter R. Co.* (112 U. S. 720), and *St. Paul and Pacific R. Co.* v. *Northern Pacific R. Co.* (139 U. S. 1). The relief awarded in those cases was under the rule declared by this Court in *Johnson* v. *Towsley*, (13 Wall. 72), and *Moore* v. *Robbins* (96 U. S. 530, 535), as follows:

> "But that in this class of cases, as in all others, "there exists in the Courts of equity the jurisdiction "to correct mistakes, to relieve against frauds and "impositions, and in cases where it is clear that "those officers have, by a mistake of law, given to "one man the land which on the undisputed facts "belonged to another, to give appropriate relief."

But it is equally clear, under the decisions of this Court, that until a contest pending in the Land Department has been finally determined and the title to the land involved has passed out of the United States, the Courts will not assume jurisdiction to correct such errors of law. This Court said, in Marquez *v.* Frisbie (101 U. S. 473, 475):

> "We have repeatedly held that the Courts will not "interfere with the officers of the Government while "in the discharge of their duties in disposing of "public lands, either by injunction or mandamus. "* * * And we think it would be quite as ob- "jectionable to permit a State Court, while such a "question was under the consideration and within the "control of the executive departments, to take juris- "diction of the case by reason of their control of the "parties concerned, and render decree in advance of "the action of the Government, which would render "its patents a nullity."

It follows, therefore, that the suits before the Court could not have been commenced while the matters involved were still *in fieri* before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States.

II.

It was suggested upon the argument, as a reason for sustaining the construction of the Northern Pacific grant adopted by the Interior Department, that under this construction many entries have been allowed and a reversal of the rule would work a hardship. In this connection the attention of the Court is requested to the provisions of the Act of Congress, approved July 1, 1898 (30 Stat.

620). By this act it is provided that wherever any qualified settler has settled upon or purchased from the United States any portion of an odd-numbered section within the limits of the Northern Pacific grant, to which the Railroad Company makes claim, he shall have the option of relinquishing such land and taking an equal quantity elsewhere, or of retaining the land, and thereupon the railroad company is required to relinquish but receives the privilege of selecting an equal quantity of public land in any State through which its line runs.

The Railroad Company is not required to relinquish land which it has sold, but in such cases the adverse claimant has the privilege of transferring his claim. It is manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land.

The suggestion of counsel that a decision by this Court, affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation. The act of July 1, 1898, is sufficiently broad to afford substantial relief. The plain object of the act is to provide a remedy where errors, such as those apparent in the records in these cases, are corrected by the courts.

C. W. BUNN, and
JAMES B. KERR,
Of Counsel.